

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KENNETH ALLEN BOWMAN,

Plaintiff,

v.

CAROLYN W. COLVIN , Acting
Commissioner of Social Security,

Defendant.

Case No. C12-874-RSL-BAT

**REPORT AND
RECOMMENDATION ON
MOTION FOR EAJA FEES**

Plaintiff moves for \$7,702.34 in attorneys' fees and \$27.77 in costs under the Equal Access to Justice Act ("EAJA"). Dkt. 26. The Commissioner opposes the motion, arguing that as her position was substantially justified, the Court should deny the motion and award no fees. Dkt. 30.

The Court may award EAJA fees if (1) the plaintiff is the prevailing party; (2) the government has failed to show its positions during the case were substantially justified or that special circumstances make such an award unjust; and (3) the requested attorneys' fees are reasonable. 28 U.S.C. § 2412(d)(1)(A); *see, e.g., Perez-Arellano v. Smith*, 279 F.3d 791, 792 (9th Cir. 2002). Plaintiff is a prevailing party as the Court reversed and remanded the Commissioner's final decision, under sentence four, for further administrative proceedings. *See*

1 Dkt. 26; *Flores v. Shalala*, 49 F.3d 562, 568 (9th Cir. 1995) (an applicant for benefits is a
2 prevailing party upon procuring a sentence-four remand for further administrative proceedings).
3 The Commissioner does not dispute this but argues EAJA fees should be denied because the
4 government's position was substantially justified. To meet the "substantially justified" standard,
5 the government must advance a position justified to a degree that could satisfy a reasonable
6 person. *See Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *accord Le v. Astrue*, 529 F.3d
7 1200, 1201 (9th Cir. 2008). In other words, the government's position must have had a
8 "reasonable basis in both law and fact." *Pierce*, 487 U.S. at 565; *accord Shafer v. Astrue*, 518
9 F.3d 1067, 1071 (9th Cir. 2008). In this case, the Court reversed the Commissioner because the
10 ALJ committed harmful error by failing to discuss or account for all limitations found by
11 William Lysak, Ph.D. *See* Dkt. 22. The Commissioner nevertheless argues she was
12 substantially justified in her positions, contending the ALJ's decision was both legally sound and
13 supported by evidence of record. Dkt. 30. This argument defies the plain fact that the ALJ
14 placed great weight on Dr. Lysak's opinion but nonetheless disregarded a limitation that had an
15 indisputable bearing on plaintiff's residual functional capacity. This error was not harmless
16 because, contrary to the Commissioner's argument, *id.* at 2, the ALJ failed to include the omitted
17 limitation in the hypothetical questions posed to the vocational expert. Hence, neither the facts
18 nor the law support the Commissioner's position. Accordingly, as the Commissioner was not
19 substantially justified in her position the Court **RECOMMENDS** that plaintiff's EAJA motion
20 for \$7,702.34 in attorneys' fees, and \$27.77 in costs be **GRANTED**.

21 A proposed order accompanies this Report and Recommendation. Objections, if any, to
22 this Report and Recommendation must be filed and served no later than **October 1, 2013**. If no
23 objections are filed, the matter will be ready for the Court's consideration on **October 4, 2013**.

1 If objections are filed, any response is due within 14 days after being served with the objections.

2 A party filing an objection must note the matter for the Court's consideration 14 days from the
3 date the objection is filed and served. Objections and responses shall not exceed eight pages.

4 The failure to timely object may affect the right to appeal.

5 DATED this 17th day of September, 2013.

6
7 

8 BRIAN A. TSUCHIDA
9 United States Magistrate Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23